EME COURT, U.S.

No. 607

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United States Court of Appeals

For the Second Circuit

Civil Action No. 72-258

MILDRED L. MILLER, individually and as Administratrix of the goods, chattels and credits of JAMES W. MILLER, deceased,

Plaintiff-Appellant.

against

FARRELL LINES, INCORPORATED,

Defendant-Appellee.

BRIEF AND APPENDIX FOR PLAINTIFF-APPELLANT

HERBERT J. KAPLOW,
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UNITED STATES COURT OF APPEALS
FILED
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Defendant-Appellee.

BRIEF FOR PLAINTIFF-APPELLANT

Statement

This is an appeal from a final judgment of the Court below, setting aside a jury verdict in favor of plaintiff-appellant in the sum of $55,000, and directing a verdict in favor of defendant-appellee.

This suit at law was an action to recover pecuniary damages for the wrongful death of plaintiff-appellant's decedent and was predicated upon the provisions of the Jones Act, 46 U. S. C. Section 688.

The complaint alleged two counts of negligence. The first count alleged negligent failure to provide adequate, prompt and proper medical care and attention. The second count alleged negligent failure to take proper and efficient means to effect a rescue of plaintiff-appellant's decedent.

Trial was held before the Honorable Edmund L. Palmieri and a jury in the United States District Court for the Southern District of New York on October 18, 19, 20, 21, 24 and 25, 1955.

After all the evidence of both parties had been presented, the Court submitted the case to the jury with directions to bring in a general verdict accompanied by answers to special interrogatories—(the special interrogatories having been worded by the Court and consented to by counsel for both parties to the action).

After deliberating approximately eight hours, the jury returned with a general verdict in favor of plaintiff-appellant in the sum of $55,000 and simultaneously, the jury returned with answers to all the special interrogatories which were consistent with their general verdict.[1]

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[1] The Clerk: Mr. Foreman, have you agreed upon a verdict?
The Foreman: We have.
The Clerk: How do you find?
The Foreman: Do you want me to read it, your Honor?
The Court: Yes.
The Foreman: "Miller v. Farrell Lines Company.
"First: Did Miller's conduct aboard the S. S. African Glade between November 10, 1950, and November 14, 1950, manifest signs of instability which could reasonably have led the Master or his associate officers or Chief Electrician Levy to believe that there was danger that he might do harm to himself?"
The answer is no.
"Second: Upon being notified that Miller had disappeared from the S. S. African Glade at 10:20 A. M. on November 15, 1950,
"(a) Was James W. Miller alive at that time?"
The answer is yes.
"(b) Did Captain Wilder, the Master of the ship, take all proper and efficient means to effect a rescue?"
The answer is no.
"Third: In addition to answering the above questions, please report your verdict as follows:
"For the defendant"—No.
"Plaintiff"—Yes.
"(a) Amount, if any, awarded for the pain and suffering of James W. Miller." None.
"(b) Amount, if any, awarded for the pecuniary loss to the widow." $10,000.
"(c) Amount, if any, awarded for the pecuniary loss to the child." $45,000.

The Court then, within minutes after the jury verdict, upon motion of defendant-appellee, set aside this jury verdict and directed a verdict for defendant-appellee.

Judgment was entered on October 26, 1955 and the reformed and resettled judgment was filed on January 5, 1956 *nunc pro tunc.*

Questions Presented

1. Did the Trial Court deprive the plaintiff of her Constitutional right of trial by jury when it set aside the general verdict of the jury in favor of the plaintiff, after the jury, in answer to special interrogatories, found the Master of the vessel negligent in failing to take proper and efficient means to effect a rescue and after the jury decided that said negligence contributed at least in part to the death of plaintiff's decedent in this Jones Act case?

2. Did the Trial Court err when he substituted his judgment of the facts in place of the findings of fact of the jury which answered special interrogatories consistent with their general verdict in favor of the plaintiff and when he thereupon set aside the jury verdict and directed a verdict for the defendant in this Jones Act case where the evidence and the reasonable inferences to be drawn therefrom were such that fair-minded men might reach different conclusions?

Statutes and Rules

TITLE 46 U. S. C. § 688

"*§ 688. Recovery for injury to or death of seaman*

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of

the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185: June 5, 1920, c. 250, § 33, 41 Stat. 1007."

TITLE 45 U. S. C. § 52

"§ *52. Carriers in Territories or other possessions of United States*

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or *death resulting in whole or in part from the negligence* of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. Apr. 22, 1908, c. 149, § 2, 35 Stat. 65." (Italics ours.)

Federal Rules of Civil Procedure

"RULE 50. MOTION FOR A DIRECTED VERDICT.

(a) *When Made: Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

"Rule 49. Special Verdicts and Interrogatories.

* * *

(b) GENERAL VERDICT ACCOMPANIED BY ANSWER TO INTERROGATORIES. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial."

United States Constitution

AMENDMENT VII—CIVIL TRIALS

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Facts

James W. Miller (plaintiff-appellant's decedent in this action) signed shipping articles on the S.S. "African Glade" on November 10, 1950 as assistant electrician (88). He disappeared at sea during a voyage on the night of November 14-15, 1950 (102). He was given up as lost at sea when darkness set in on November 15, 1950 (102).

He was a naturalized American citizen (14) sailing under the American flag on a ship owned, operated and controlled by the defendant-appellee, an American corporation.

He was born in Scotland in 1914 (7) and had followed the sea as his life's calling since 1928 (Ptf. Ex. 7—R. 12) when he started as an apprentice. During the course of his career he rose from apprentice seaman to Master of British ships (Ptf. Ex. 5—R. 11). After service on British ships, he came to America, started in the engine department and served successively as wiper, oiler and then fireman-water tender. On November 3, 1950 he graduated from a United States Maritime Service School as a qualified Assistant Electrician (Ptf. Ex. 31A—R. 132) and signed shipping articles on November 10, 1950 on the S.S. "African Glade" for his first and last voyage as an assistant electrician. He also had completed correspondence courses in radio, electronics and allied fields (Ptf. Ex. 15—R. 27) and had studied for Third Assistant Engineer at a private maritime school although he had not, as of November 15, 1950, sat for a license as Third Assistant Engineer.

On May 25, 1946 he married the plaintiff-appellant, an American citizen born in 1925. On December 2, 1947 their son Michael was born in Baltimore, Maryland (7). He was survived by his wife and son.

The S.S. "African Glade" was a C-2 type freighter (92) (174). After signing on her full complement of crew and embarking her 11 passengers, she set sail from New York

in the evening of November 10, 1950 on her course for Dakar, West Africa, her first port of call (77). The voyage was on a trade route of the Atlantic Ocean regularly used as a shipping lane or highway for United States to West Africa commerce (354).

With respect to the first count of negligence (commonly called "neglect to treat") the plaintiff called as a witness Chief Electrician Kenneth O. Levy, decedent's superior (153) and roommate (154). Levy testified that Miller had not slept in his bed for two consecutive nights (the nights of November 13-14 and November 14-15) (199); that Miller was quiet (230); that Miller shared a bottle of rum with another seaman on the night of November 12 (193); that Miller asked Levy for a cigarette although Miller had originally told Levy that he had given up smoking (231).

Chief Steward Aiken, on behalf of the defendant, testified that there was nothing unusual about Miller in all of his contacts with him although he did admit he saw Miller pacing the deck on the night of November 14 about 11:30 P. M. (562), which was the last time Miller was seen alive on the vessel (573).

The jury, by their negative answer to Interrogatory First, decided this issue of fact of "neglect to treat" against the plaintiff on the first count of negligence.

With respect to the second count of negligence (commonly called "failure to rescue"), the plaintiff called as witnesses (in addition to Chief Electrician Levy), Captain Wilder (Master of the S.S. "African Glade") (76) and Captain Feinne, a Master-Mariner and maritime expert (323). Captain Wilder's testimony was presented by his deposition (Court Ex. 1—R. 163) originally taken by the defendant.

Captain Wilder testified that he was informed at 10:20 A. M. on November 15 of the fact that Miller was apparently not on board the ship (79); that he caused search-

ing parties to be sent to various parts of the ship (79); that simultaneously he turned the ship about on a reverse course as he believed Miller had fallen over the side (79); that he interrogated only Chief Electrician Levy (113), Chief Steward Aiken (114) and First Assistant Engineer Crowell (115); that he learned from Aiken that Aiken last saw Miller alive at 11:30 P. M. on November 14; that he assumed from Levy's information that Miller disappeared prior to 6 A. M. on November 15 (102); that he did not interview the entire crew (115) nor any of the passengers concerning Miller's disappearance; that he sent only one telegram to a U. S. Coast Guard Weather Ship (79) and had no further communication with the U. S. Coast Guard; that he did not communicate with any other ships in the ocean track though it was a trade route; that he did not require the navigating officer, Second Mate Ware, to obtain any "fix" of "position" at any time during the day of November 15; that he called off the search at 5:16 P. M. on November 15 when darkness set in; that he did not use the searchlight of the ship though it was available; that the vessel traveled approximately 165 miles between 11:30 P. M. November 14 and 10:30 A. M. November 15 (99); that the vessel traveled approximately 95 miles between 10:30 A. M. November 15 and 5:16 P. M. November 15 (99); that the air temperature varied from 77° at noon of November 14 to 76° at noon of November 15 and at midnight of November 14-15 it was 74° (111).

Captain Feinne, plaintiff's maritime expert, testified that, according to the known positions of the ship as given in the ship's log, the Master (Captain Wilder) *had not* reversed course on a *reciprocal* course but *had* reversed course on a *parallel* course and was twelve to thirteen miles south of a reciprocal course (343) (461); that the Master had not returned on his own track (346) (397); that a competent master would return to a position where Miller was last known to be alive (349); that upon reaching that position a competent master would perform a search pattern

with the ship (359); that a competent master would radio other ships on this trade route or ocean "highway" (354); that a competent master would be in frequent communication with the U. S. Coast Guard; that a competent master would have the navigating officer check the ship's position during the search and try to establish by celestial navigation where the ship was (344); that a competent master would interrogate all crew members (359) and passengers to learn as much as possible about the disappearance; that a fall from the after-end of the vessel could or could not cause injury (472); that a person falling from the after-end of the vessel would not be caught up in the propeller (488).

In answer to the hypothetical question (373-376) by plaintiff's counsel, Captain Feinne testified that in his expert opinion Captain Wilder did not make a competent and efficient search (376).

In the conflict between the testimony of Capt. Wilder and Captain Feinne, the key issues of fact were laid bare—Did the ship's Master fail to take efficient and proper means to effect a rescue? Was this failure of the ship's Master the cause, at least in part, of plaintiff's decedent's death?

The conflict on these issues of fact was further enhanced and magnified by testimony on behalf of defendant by its witnesses Capt. Sheridan (662-745) and Capt. Umstead (745-761), both Master Mariners and maritime experts, and Officer Ware (593-661), Second Mate of the S.S. "African Glade", who was the navigating officer during the voyage.

Capt. Sheridan answering a lengthy hypothetical question on direct examination by defense counsel testified that the action taken by the ship's Master "was a proper and seamanlike search" (683-685). Capt. Sheridan testified on cross-examination that it wouldn't matter what the ship's position was at the start of the search (715) and that it is "immaterial" to learn where you are or were at the time of making your search (717). Capt. Sheridan did admit

on cross-examination that the navigating officer on November 15 could have taken "fixes" (723).

Capt. Umstead testified on direct examination by defense counsel that in his opinion the ship's Master followed "a correct navigational and seamanlike procedure" in the search (751).

Capt. Umstead, like Capt. Sheridan, testified on cross-examination that it doesn't make any difference where you are on the ocean when you are looking for a man as in this case (760).

But Capt. Umstead did admit that in an emergency such as in this case "you always want to know where you are" (760). Second Mate Ware testified that the ship returned on a reciprocal course (644).

In rebuttal Capt. Feinne testified that a competent master would use every known method to establish his position and learn his course (772). In response to a question by the Court, Capt. Feinne testified that without a fix and without having definite information as to the course over the ground nobody running a ship can possibly turn a reverse course and follow a reverse course (779).

The Trial Court in the charge to the jury recognized the vital existence of these key issues of fact. Indeed the Court with painstaking detail set forth the jury's duty to decide between the maritime experts on the issue of adequate search and to determine whether (assuming the jury found the search was inadequate) this inadequate search was the proximate cause, at least in part, of Miller's death (872-875).

LAW

POINT I

The basis of recovery in an action under the Jones Act is negligence and failure to perform an efficient rescue is a negligent act.

The Jones Act, 46 U. S. C. Sec. 688, expressly extends to a seaman (or his personal representative, in case of death) who suffers injury or death during the course of his employment the right of action which the Federal Employer's Liability Act, 45 U. S. C. Sec. 51 *et seq.* confers upon railway employees. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375. It follows therefore that negligence is the basis of a seaman's action for damages under the Jones Act. *Jamison* v. *Encarnacion,* 281 U. S. 635.

Judge Frank said in discussing the concept of negligence in *Koehler* v. *Presque-Isle Transp. Co.,* 141 F. 2d 490 (2 Cir. 1949):

> "We think it [negligence] includes any knowing or careless breach of any obligation which the employer owes to the seamen. Among these obligations is that of seeing to the safety of the crew."

One of the most ancient obligations of the vessel has been and is, the obligation to rescue a seaman fallen overboard during a voyage. In *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 377 the Supreme Court said:

> "There is little doubt that rescue is a duty when a sailor falls into the sea"

citing *U. S.* v. *Knowles,* 4 Sawyer 517, 26 Fed. Cas. 800, Case No. 15540.

Judge Field, in 1864, in the *Knowles* case said:

> "Now, in the case of a person falling overboard from a ship at sea, whether passenger or seaman, when he is not killed by the fall, there is no question as to the duty of the commander. He is bound, both by law and by contract, to do everything consistent with the safety of the ship and of the passengers and crew, necessary to rescue the person overboard, and for that purpose to stop the vessel, lower the boats and throw to him such buoys or other articles which can be readily obtained, that may serve to support him in the water until he is reached by the boats and saved. No matter what delay in the voyage may be occasioned, or what expense to the owners may be incurred, nothing will excuse the commander for any omission to take these steps to save the person overboard, provided they can be taken with a due regard to the safety of the ship and others remaining on board. Subject to this condition, every person at sea, whether passenger or seaman, has a right to all reasonable efforts of the commander of the vessel for his rescue in case he should by accident fall or be thrown overboard."

In addition to affirming that the duty to rescue is a duty of the vessel, the Supreme Court in the *Cortes* case went on to say

> "and that a liability to respond in damages is cast upon the shipowner if he (a sailor) is abandoned to his fate."

Certainly in the instant case the duty to rescue existed not only by tradition, not only by law, but most important it existed in the mind of the Master of the vessel himself as evidenced by his answer to the question concerning

what he did when he was informed on November 15, 1950 at 10:20 A. M. of Miller's absence (79).

> "Q. What else did you do? A. When they reported to me that they could not find him, I turned the vessel around on its course, and following the track back on a 180-degrees change, *we began searching for Miller, as I believed he was not on board and had fallen over the side.*"

It is fundamental that in order to establish negligence under the Jones Act, there must be a duty and a breach of that duty and the breach must contribute "*in whole or in part*" to the injury or death of the seaman.

The duty in the instant case was the duty to rescue (329). Even defendant's counsel conceded this in his argument on his motion for a directed verdict at the close of plaintiff's case (516).

Was there a breach of this duty? The appellant contends that this question is an issue of fact to be determined by the jury.

The Trial Court, after a deep and thoughtful search of conscience, indicated, upon the argument of defendant's motion for a directed verdict at the close of plaintiff's case, that he agreed with appellant's view that the question of the breach of duty (by an inefficient and improper rescue attempt) was an issue of fact for the jury to determine (525, 526, 530, 535, 536), though the question was not free from doubt in the Court's mind (534) but unfortunately, after the jury verdict was announced, the Trial Court veered away from the sound views he had previously expressed concerning the jury's function and granted defendant's motion for a directed verdict (899).

It would seem that the doubt expressed by the Trial Court should be set at rest in view of the language in the decision of the U. S. Supreme Court in *Schulz* v. *The Penn-*

sylvania Railroad Co., 350 U. S. 523 (April 9, 1956), which was the most recent pronouncement of the doctrine concerning the jury function which has been evolved by the Supreme Court since *Jones* v. *East Tennessee V. & G. R. Co.*, 128 U. S. 443 (1888); *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, and most particularly in *Lavender* v. *Kurn*, 327 U. S. 645.

In the *Schulz* case Judge Black speaking for the majority said:

> "In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, theretofore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. 'We think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee, V. & G. R. Co., 128 U. S. 443, 445 (1888)."

At this point it may be well to point out that even assuming there were no duty to rescue, it is well settled that a volunteer must perform an undertaken task in a careful

and prudent manner even though he need not have volunteered in the first place. [Certainly a Master, who turns his ship about and travels 95 miles in search of a sailor fallen overboard, is a volunteer.]

In *Moch* v. *Rensselaer Water Co.*, 247 N. Y. 160, Chief Judge Cardozo enunciated the law on volunteers:

> "The hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all."
>
> "It is ancient learning that one who assumes to act, even though gratuitously may thereby become subject to the duty of acting carefully, if he acts at all."

See also *McDonough* v. *Buckeye S. S. Co.*, 103 F. Supp. 473.

Whether the Master in the instant case was acting as a volunteer or was acting under an affirmative duty to rescue, it was for the jury to determine whether the Master acted in a careful and prudent manner. The jury could accept or reject the expert opinion and testimony on either side based as it was on the experts' experience, the ship's log and the ship's positions contained therein, the charting of the ship's voyage and the admitted acts of the Master. The jury chose to believe the plaintiff's expert and therefore they answered interrogatory 2(b) in the negative on the issue of whether the Master took all proper and efficient means to effect a rescue.

Thus, the first key issue of fact, namely, whether the ship's Master failed to take efficient and proper means to effect a rescue, was properly a jury question and was decided by the jury in favor of the plaintiff.

The second key issue of fact is whether the breach of the duty contributed "*in whole or in part*" to Miller's death and this issue too was properly a jury question. It

is not incumbent upon this plaintiff under the Jones Act to prove that the breach of duty was the sole cause of the death. The plaintiff herein must succeed if the breach of duty contributed even "*in part*" to Miller's death. *Schulz* v. *The Pennsylvania Railroad Co.*, cited *supra* and 45 U. S. C. Sec. 52, 46 U. S. C. Sec. 688.

In the *Schulz* case the Supreme Court delineated the jury function in this language:

> "In this case petitioner is entitled to recover if her husband's death resulted '*in whole or in part*' from defendant's negligence. Fairminded men could certainly find from the foregoing facts that defendant was negligent in requiring Schulz to work on these dark, icy and *under-manned* boats. And reasonable men could also find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties.[6] But the courts below took this case from the jury because of a possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences.[7] For 'The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.'[8] Fact finding does not require mathematical

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[6] Cf. *Sadler* v. *Pennsylvania R. Co.*, 159 F. 2d 784.

[7] *Johnson* v. *United States*, 333 U. S. 46.

[8] *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 35. Conversely, "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." *Ibid.*

certainty.[9] Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn.

"We think the evidence was sufficient to require submission of the case to the jury, and that it was error not to do so."

It is appellant's contention that it was the function of the jurors to decide this second key issue of fact since from the evidence adduced, they would be justified in finding *as they did* that Miller was alive at the start of the search and that a Master who was 12 to 13 miles south of the correct reverse course and who only communicated with the U. S. Coast Guard weather ship once during the entire search and who did not attempt to communicate by radio with any other ships in this well-traveled trade route and who did not ascertain accurately the course he had been on nor the reverse course he was following, certainly *contributed at least in part* to Miller's death.

It is no answer (to the problem of whether it is properly a jury function to determine the second key issue of fact in this case), to say that the exercise of the jury function involves a measure of speculation and conjecture. In *Lavender* v. *Kurn*, 327 U. S. 645, the Supreme Court, in discussing this very question said at page 653:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by

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[9] *Lavender* v. *Kurn*, 327 U. S. 645, 653.

> choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The *Lavender* decision applies with equal force to cases under the Jones Act. *Cox* v. *Roth*, 348 U. S. 207 (1955).

In *Casey* v. *American Export Lines*, 173 F. 2d 324 (2 Cir. 1949), a verdict for plaintiff was affirmed and among other things Judge Swan said at page 327:

> "It must also be conceded that the precise moment of Capt. Casey's death is unknown and that even if the fire had been discovered promptly and if the inside fire hose had been available under sufficient pressure without any delay, one cannot know with certainty that the captain's life would have been saved. * * * But almost every verdict of a jury involves the element of speculation or conjecture to some extent."

Then at page 328 Judge Swan stated:

> "* * * In our opinion the causal relation between the negligence and the death was a question for the jury."

See also:

Wilkerson v. *McCarthy*, 336 U. S. 53 (1949);
Stone v. *New York C. & St. L. R. Co.*, 344 U. S. 407 (1953);
Blair v. *Baltimore & O. R. Co.*, 323 U. S. 600 (1945);
Johnson v. *Griffiths S.S. Co.*, 150 F. 2d 224 (9 Cir., 1945);
McDonough v. *Buckeye S.S. Co.*, 103 F. Supp. 473 (N. D. Ohio, 1951).

POINT II

The submission of written interrogatories by the Trial Court to the jury pursuant to Rule 49(b) of Federal Rules of Civil Procedure was determination by Trial Court that issues of fact existed in the instant case.

The Trial Court in an honest endeavor to resolve the doubt existing in his own mind, consciously and with full knowledge of the meaning and import of Rule 49(b) F. R. C. P. conceived and drafted the written interrogatories which were submitted to the jury after the exact language of the interrogatories was agreed upon and consented to by counsel for both parties and the Court.

Certainly the appellee will not dispute that Interrogatory First, addressed to "neglect to treat" was an issue of fact. Especially in view of the fact that the jury answered Interrogatory First in favor of appellee.

Can the appellee or the Trial Court dispute that Interrogatory Second addressed to "failure to rescue" was any less an issue of fact merely because the jury answered both parts of Interrogatory Second in favor of appellant and rendered a consistent general verdict in favor of appellant?

In *Pacific Greyhound Lines* v. *Zane*, 160 F. 2d 731 (9 Cir. 1947), at page 737 the Court said:

> "The Federal Rules of Civil Procedure, Rule 49, were designed to encourage and facilitate the use of the special verdict, or, in the alternative, the general verdict accompanied by answers to interrogatories as to *issues of fact.*"

See also *Skidmore* v. *Baltimore & Ohio R. Co.*, 167 F. 2d 54, 67 (2 Cir. 1948).

Another point which must necessarily be recognized is that even though the Interrogatories submitted to the jury do not include a question whether violation of a statute was the proximate cause of the accident, the general verdict in favor of plaintiff constitutes a sufficient finding of such connection. See *Bolan* v. *Lehigh Valley R. Co.*, 167 F. 2d 934 (2 Cir. 1948).

The very purpose of Interrogatories submitted to a jury pursuant to Rule 49(b) F. R. C. P. is to determine what facts are found by the jury as a basis for their general verdict. It is especially necessary to have interrogatories in a wrongful death action such as the instant case since the jury can only come to a conclusion upon the basis of the testimony of the living crew members, the expert witnesses and the physical facts and inferences to be drawn from all this testimony. The lips of the one who could tell what actually happened are sealed forever and the occurrence must be reconstructed from the evidence gleaned from the best available sources.

In the absence of the decedent, there inevitably must be differing conclusions which reasonable men may reach because the jury brings to the deliberation room their varied backgrounds and experiences which any twelve people must have. It was to aid these twelve people in their deliberations and to insure that they performed their function properly that the Trial Court in the instant case submitted

to them written interrogatories. This act of the Trial Court was a determination by the Trial Court that issues of fact did exist which had to be resolved by the jury.

As conscientious as the act of the Trial Court was in submitting interrogatories to the jury so grievous was the error of the Trial Court in casting aside and obliterating the jury's answers to the interrogatories by directing a verdict for the defendant-appellee in complete disregard of the findings of fact of the jury. In committing this grievous error the Trial Court deprived the plaintiff of her right of a jury trial under the Seventh Amendment.

See *Galloway* v. *U. S.*, 319 U. S. 372 (1943) and *Schulz* v. *Pennsylvania Railroad Company*, cited *supra*.

POINT III

Under Rule 50 of Federal Rules of Civil Procedure a motion for a directed verdict may not be granted when reasonable men may differ as to what the verdict should be on the evidence.

Just when a Trial Court may grant a motion for a directed verdict has been discussed by various courts using different words but all expressing the same fundamental principle. Perhaps the clearest pronouncement of this fundamental principle is found in the Supreme Court opinion in *Gunning* v. *Cooley*, 281 U. S. 90 (1929) where the Court said at page 94:

> "Where uncertainty as to the existence of negligence arises from *a conflict in the testimony* or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. Richmond & Danville Railroad v. Powers, 149 U. S. 43, 45." (Italics ours)

See also

Di Nicola v. *Pennsylvania R. Co.*, 158 F. 2d 856 (2 Cir. 1946);

Zinnel v. *U. S. Shipping Board Emergency Fleet Corp.*, 10 F. 2d 47;

Mattson v. *Central Electric & Gas Co.*, 174 F. 2d 215;

Galloway v. *U. S.*, 319 U. S. 372, 395 (1943).

In *Tennani* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29 (1944) at page 35, the Court stated:

> "* * * It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U. S. 554, 571, 572; Tiller v. Atlantic Coast Line R. Co., supra, 68; Bailey v. Central Vermont Ry., 319 U. S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because Judges feel that other results are more reasonable."

In the instant case there certainly existed a conflict in the testimony between the experts as to whether the vessel's Master performed the attempted rescue in a competent manner; as to how long a person could be expected to survive in the particular area of the Atlantic Ocean affected as it was by the Gulf Stream; as to whether plaintiff's decedent was injured upon leaving the vessel and entering the water and as to whether the vessel was on a parallel

reverse course or a reciprocal reverse course during the rescue attempt. There were also conflicting conclusions which could have been drawn by the jury from the testimony of Chief Electrician Levy and Chief Steward Aiken with respect to whether plaintiff's decedent was mentally disturbed during the five days of the vessel's voyage by reason of the fact that Miller did not sleep in his bed for two consecutive nights and renewed the smoking habit and drank some rum on one night. The jury in answering Interrogatory First in the negative resolved this conflict concerning Miller's mental condition. In their answers to Interrogatory Second the jury resolved the conflict of testimony between the experts and the jury concluded that the negligence of the defendant caused, at least in part, the death of plaintiff's decedent. While the Trial Court may have reached conclusions opposite to that of the jury and may have differed with the ultimate findings of fact of the jury, he committed error when he directed a verdict for the defendant-appellee in the face of the very existence of differences between the Trial Court and the jury.

In *Mattson* v. *Central Electric & Gas Co.*, 174 F. 2d 215, the court expressed the applicable law in these words at page 217:

> "To warrant the direction of a verdict the evidence must be such that all reasonable minds can come to only one conclusion on the facts. When minds may reasonably differ as to what the verdict should be on the evidence, the cause should be submitted to the jury. Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720."

CONCLUSION

It is respectfully submitted that the judgment directing a verdict in favor of defendant be reversed and that the verdict of the jury in favor of the plaintiff be reinstated and that a judgment upon the jury verdict in favor of the plaintiff be entered and that plaintiff be granted such other and further relief as to this Court may seem just and proper.

Respectfully submitted,

HERBERT J. KAPLOW,
Attorney for Plaintiff-Appellant.

APPENDIX

United States Court of Appeals

For the Second Circuit

MILDRED L. MILLER, individually and as Administratrix of the goods, chattels and credits of JAMES W. MILLER, deceased,

Plaintiff-Appellant,

against

FARRELL LINES, INCORPORATED,

Defendant-Appellee.

Statement Under Rule 15(b)

Action for damages for wrongful death pursuant to the provisions of the Jones Act, 46 U. S. C. § 688.

Action was commenced by filing of a summons and complaint on *Jan. 11, 1952.* The answer was filed on *Feb. 16, 1952.*

Trial was held before the Honorable Edmund L. Palmieri, United States District Judge, Southern District of New York and a jury in New York, N. Y., on Oct. 18, 19, 20, 21, 24 and 25, 1955.

The Court directed a verdict for the defendant after setting aside the jury verdict in favor of plaintiff in the sum of $55,000.00.

Judgment was entered on October 26, 1955 and was re-settled nunc pro tunc on January 4, 1956 and entered on January 5, 1956.

Notice of appeal was filed on *Nov. 22, 1955.*

Appeal was docketed on *April 9, 1956.*

There has been no change of parties or attorneys in this action.

Original Judgment

(Record, pages 913, 914)

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The issues in the above entitled action having been brought on regularly for trial before the Hon. Edmund L. Palmieri and a jury on Oct. 18, 19, 20, 21, 24 and 25, 1955, and the Court having directed a verdict in favor of the defendant, it is

ADJUDGED: That the defendant have judgment against the plaintiff.

Dated, New York, October 26, 1955.

WILLIAM V. CONNELL,
Clerk.

Resettled Judgment

(Record, pages 929, 930)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The plaintiff by her attorney, Herbert J. Kaplow, Esq., having moved this Court by Notice of Motion dated December 13, 1955, for an order resettling nunc pro tunc the judgment heretofore entered in this case on October 26, 1955, and said motion having come on to be heard in this Court on the 4th day of January, 1956, and the plaintiff having appeared by Herbert J. Kaplow, Esq., and the defendant having appeared by Stapleton, Flynn & Lilly, Daniel Flynn of Counsel, having consented thereto, it is hereby

ORDERED, that the judgment heretofore entered in this action on October 26, 1955, is hereby amended nunc pro tunc to read as follows:

"The issues in the above entitled action having been brought on regularly for trial before the Hon.

Resettled Judgment

Edmund L. Palmieri and a jury on October 18, 19, 20, 21, 24 and 25, 1955, and the defendant having moved for a directed verdict at the close of the plaintiff's case and the Court having reserved decision thereon and the defendant having renewed its motion at the close of the defendant's case and the Court having reserved decision thereon and the jury having rendered a verdict in favor of the plaintiff in the sum of $55,000.00 and the defendant having moved to set aside the jury verdict and the defendant having again renewed its motion for a directed verdict, made at the close of the entire case, and the Court having granted defendant's motion to set aside the jury verdict and the Court having granted defendant's motion for a directed verdict in favor of defendant, it is

ADJUDGED, that the verdict of the jury in favor of the plaintiff in the sum of $55,000.00 is set aside; and it is further

ADJUDGED, that a verdict is directed in favor of the defendant, and it is further

ADJUDGED, that the defendant have judgment against the plaintiff.

EDMUND L. PALMIERI,
U. S. D. J.

Dated: New York
January 4, 1956.

Excerpts from Testimony

Capt. Theodore I. Feinne—For Plaintiff—Direct

[328] The Court: Well, let me say this to the jury [329] right now in order to avoid these excursions into the law and into what you are going to be charged because I don't think that it is a good plan to argue the case when you are taking the evidence—that should be done at the close of the case—the basic rule is that the master of the ship should take proper and efficient means to effect a rescue of a seaman who has fallen overboard from any cause whatever, and it may be that one of the questions in this case that you may be called upon to decide will be whether, in this case, the master of the ship took proper and efficient means to effect a rescue.

Now, I think that that is all I need tell you at this time.

* * *

[338] Q. Does that indicate he was sailing 118 degrees true? A. According to this layout, according to the position taken over this log book of November 14th, and the position of his fix which was taken by some bodies, the sun, the moon, stars or planets, on November 15th, he was sailing a course of approximately 120 degrees true instead of 118.

* * *

[343] Q. In other words, he was 13 miles away from where he thought he was? A. He was 13 miles further south than 118 true course, according to his fix.

Q. So that when he made that turn around he was off his course, wasn't he? A. He wasn't on a 118. He was between 12 and 13 miles further south than what he thought he was.

* * *

[349] What in your opinion would a competent master have done as the first step, right then and there? A. I would have broke out every member of the crew. I would have had the master to broke out every member of the crew and would have instituted a search. He would have placed lookouts on various advantageous points aboard ship. He would have broke out his navigator if he was asleep or officer on watch. He would have had to plot his position at approximately 11.30, the last time, when he found out the last time he was seen, ascertain that; would have ascertained his position or the area where the man was last seen and would have put it on his chart.

Q. In other words, one of the very first things in your opinion that a competent master would do would be to ascertain the position of the vessel as of when the man was last seen aboard the vessel, is that correct? [350] A. That is true. That is one of the first things.

Q. By the way, did this vessel—did you plot that on this map, the 11.30 position of when he was last seen aboard? A. I did it this way, by taking his fix.

Q. Did you? A. Yes, sir, I did.

Q. Now, did this vessel ever return to the place where Mr. Miller was last seen on board the vessel; did the vessel ever return to that point? A. According to his log book he returned only to this point (indicating).

Q. When you say "this point,"— A. Measured on the chart it was about—

Q. What do you mean? A. —about 42 to 45 miles away from the last area the man was known to be seen.

Q. So he never did return, as a competent master should, in your opinion, to the point where the man was last seen alive? A. No. According to his log book, no.

Q. Now let us get to the search itself. In addition to making out the crew and having—incidentally, this investigation that you described, that would be going on while

the vessel would be [351] turned back, wouldn't it? A. That is true, sir.

Q. In addition to that, and in addition to making your position as of the time when the man was last seen, what other steps, in your opinion, would a competent master take in his search? A. He would have immediately had his navigating officer look up, or another officer on the bridge, look up his track chart.

* * *

DEFENDANT'S MOTION FOR DIRECTED VERDICT

[525] The Court: Isn't that precisely why we have a jury?

Mr. Flynn: Not to speculate.

The Court: Isn't that precisely why we have taken all the proof in this case?

Isn't it up to the jury to draw whatever reasonable inferences they believe are proper under the admissible proof in order to ascertain the nature of his disappearance, and in order to ascertain whether, under the circumstances of his disappearance, the search was diligent and proper?

Mr. Flynn: If your Honor please, you have got to go further. You have got to have here some showing that a rescue effort could have been successful. In other words, there has got to be some affirmative proof that a rescue of this man—

The Court: If they believe everything that Captain Feinne said and excluding any inferences favorable to you, drawing all of the inferences most favorable to the position of the plaintiff in this case, and accepting at full value everything that [526] Captain Feinne said, could they not come to the conclusion that a diligent and proper search might have saved him and that a diligent and proper search—and that there was not a diligent and proper search in this case?

Could they not come to that conclusion?

* * *

Defendant's Motion for Directed Verdict

* * *

[530] The Court: But you have the expert testimony of Captain Feinne from which the jury could infer, could it not, that Miller was alive when the alarm was given, and his disappearance had been discovered, and that he could have remained alive throughout all of the hours of that search, and he could have been found alive. If they believe that testimony would they not be entitled to come to the conclusion, on the basis of the most favorable inferences to be drawn from Captain Feinne's testimony, that the missing seaman Miller was alive and that a proper search would have discovered it? Would they not be entitled to do that?

Mr. Flynn: We cannot speculate on that.

The Court: No, no, but where you don't have affirmative proof or tangible proof of a factual element in a case, and it is supplied by expert testimony, can the jury not infer from that expert testimony those facts which are necessary to form the link of evidence between the overt or tangible proof that we have and the evidence which is not affirmatively proven, and isn't it precisely—

* * *

[536] The Court: If everything that Captain Feinne testified to is accepted by the jury and the most favorable inferences are drawn from that testimony, and any inferences favorable to you are excluded from that testimony and it is within their province to do just that, it would seem to me that they might very well come to the conclusion that things were done which should not have been done and other things were done which might not have been done.

However, I think your first two points go to the heart of the case and I should give them further consideration, and I am disposed to reserve decision.

* * *

Capt. Charles E. Umstead—for Defendant—Cross

[760] Q. Would you consider a man being reported overboard or missing or disappearing from the vessel at sea some four days out of New York as an emergency? A. A man overboard? A man overboard is always an emergency.

* * *

Q. Would you think it important to attempt to take bearings or fixes when you had a partly cloudy sky, to find out where your position of your vessel was in an emergency? A. In an emergency or at any other time you always want to know where you are.

* * *

New York, October 25, 1955,
10 o'clock A. M.

[840] (Jury in the box.)

(Mr. Flynn summed up to the jury.)

The Court: Ladies and gentlemen, do you wish to have a short recess now or do you prefer to hear the other summation? I think one or two of you would like a recess. All right, we will have a short recess.

(Jury out of box.)

(Short recess.)

(Jury in the box.)

The Court: Proceed.

(Mr. Kaplow summed up to the jury.)

The Court: Now, ladies and gentlemen, I wish to take a short recess because there are certain questions I am going to put to you at the conclusion of my charge which I have just drafted, and I want to show them to counsel before I undertake the charge.

[841] Please feel free, if you wish to withdraw, to do so, and come back to your seats informally as soon as you have taken any time you wish, and I will give you the charge whenever you are ready.

Charge of the Court

(Jury out of box.)

(Recess.)

(The following took place in the robing room.)

(Discussion off the record.)

The Court: Before charging the jury, I have shown to counsel for both sides the two questions which I believe the jury should be asked to answer, which I have had prepared in typewritten form, of which I have given them a copy, as well as the form of the verdict which I believe the jury should return in this case.

After some discussion and the making of a change in one word with respect to Question Second, subdivision (a) I believe counsel are in agreement that this is fair and proper under the circumstances and are not taking any exceptions thereto.

Is that right, gentlemen?

Mr. Kaplow: That is correct, your Honor.

Mr. Flynn: That is correct.

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[842] CHARGE OF THE COURT

The Court: Ladies and gentlemen of the jury, we have now reached the very important part of the case in which the responsibility for determining the facts passes to you.

The law, under our procedures, consigns to you, without reservation, a very grave and stupendous responsibility, that of ascertaining the facts in the case and of deciding from the controverted facts where the truth lies.

You are the sole and exclusive judges of the facts. You bring to the court room an essential contribution, that of your mature judgment drawn from varied experiences, from varied occupations, from varied attitudes and educational backgrounds, and the sum of that maturity, that experience, constitutes a precious and essential element of the justice which we administer.

You are to determine those facts under the applicable rules of law which I am going to charge you, and you are bound by oath to follow the rules of law which I charge.

Now, if any facts are referred to by me, [843] please do not attach any special significance to those facts. I have great respect for the conscientiousness, the wisdom and the practicable utility of the jury verdict. You are entitled to the opinion that there are facts to which I have not referred and which may be more important than the facts to which I have referred.

If I have asked any questions of any witnesses, I have done so purely out of a desire to further the conscientious and thorough search for the truth. I have had no other purpose, and you must attribute none to me.

Now, before getting into the heart of the case, I should like to dispose of one or two preliminary matters. I owe you a vote of thanks for your very careful attention to the evidence, for your prompt attendance at the sessions of the Court in what has proven to be a rather long and a rather difficult case.

I owe a vote of thanks to the attorneys for their competence, for their skill, for their courtesy to each other, to you and to me.

If I have had any colloquy with counsel during the course of the trial, please disregard that. Necessarily, in the course of a trial, the Judge must [844] engage in exchanges with attorneys. It is inevitable. It is part of the procedure in which we engage, and each attorney should try, just as these attorneys have tried, to represent to the best of his ability the point of view of his own client. It would be wrong if it were otherwise.

And if I have made any rulings or made any statements in connection with those rulings, you must not be concerned with them except to the extent that evidence was admitted. You must be guided solely by the evidence which was ad-

mitted, the testimony which you heard and which was given by the witnesses who appeared before you, the stipulations and concessions of counsel which constitute valid evidence, and the various exhibits, papers, which have been admitted into evidence.

I might say in that respect that with regard to the deposition of Captain Wilder, which has been marked a Court exhibit, it was solely for the purpose of guiding me in following the reading of that deposition. Actually, if in the course of your deliberations you should see fit to have the Court refer to you any exhibits or any testimony in the case, and you have that right, you would be referred in the case of Captain [845] Wilder to the portions of the deposition which were read into the record. Most of it was. There were certain parts of it which for legal reasons could not be read in, but which I believe were quite unimportant.

So that if you should need to refer to that part of the case, to that deposition, the deposition to the extent that it was admissible has been admitted into the record.

Therefore, before talking to you again about equality of justice, which is so important, let me emphasize that when you retire to the jury room you must divest yourselves of any personal impressions connected with the lawyers or the Judge. You must consign your conscientious attention, as I know you will, to the proof in the case, the admissible evidence in the case, and decide the case and render your verdict on the basis of that proof under the rules of law which I am going to charge you.

As I say, it is so important that you regard the parties to this litigation, as indeed you should regard the parties to any litigation, as being on a completely equal footing. It is true that we have a corporation here as one defendant and we have a woman as a plaintiff, who is a widow of a seaman [846] who has disappeared at sea. You must

not permit questions of sentimentality to enter into your verdict. You are not permitted by law to reach your conclusions out of sentiment or out of sympathy. You must do so only within the confines of the rules prescribed by law. It would be just as wrong for you to apply different sets of laws to different people because they have different names or different colored hair as it would for you to apply a different kind of law between the two sides of this case because one is a corporation and one is an individual.

Your feelings, just as my feelings, can have nothing to do with the conclusion which you are bound by oath to adopt.

Now, what have we here? This is a civil suit, and Mildred Miller is asking for a sum of money under a law known commonly as the Jones Act. It is an act of Congress passed in 1920, and under this Jones Act a seaman who is injured in the course of his employment, as well as the personal representative of the seaman who dies as a result of injuries received in the course of his employment, is entitled to maintain an action at law for damages with the right to trial by jury.

[847] But remember—and this is so important in this case—the recovery for damages is for negligence. The gist of this action under the Jones Act is negligence. In order to maintain an action under this Federal statute which I have just referred to negligence must be alleged and proved, and unless the seaman or the personal representative of a seamon—in this case Mrs. Miller—can establish the negligence of the owners of the vessel or the officers, agents or employees, no liability exists.

What do we mean by negligence? Negligence is the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation, or doing what such a person under those circumstances would not have done.

Let me give you a ridiculous example, because sometimes ridiculous examples serve to illustrate a point better than one that is not. Suppose a man is very high up in a skyscraper in New York City and there are doors which look like elevator doors, and they have buttons which look like electrical buttons next to them, and one of the doors has a great big sign saying "Danger—Do Not Open," and this man pushes all the buttons and an elevator does [848] not appear, and finally he becomes impatient so he kicks at the door marked "Danger" and sees that it can be opened easily. So he opens the door and steps into a shaft and then hurts himself.

Obviously that man has done something a prudent man should not do, and he would be negligent under those circumstances.

There are all kinds and gradations of negligence, and you have got to be careful to apply the rule to the facts of the case. You have got to place yourself here in the position of the people who have been charged with being negligent. I will tell you more about that in a moment.

But there are two principal bases for the claim of negligence in this case and I will tell you about that. One has to do with the alleged manifestations of signs of mental disturbance on the ship between November 10th and November 14th, 1950. The other has to do with the action of the master, his associate officers and crew after the alarm of disappearance had been given.

But I will tell you more about that in a minute.

Let me dispose of another preliminary matter. Paragraph 9 of the complaint reads:

> [849] "Plaintiff's decedent left him surviving his wife, Mildred L. Miller, the plaintiff and administratrix herein, and their son born December 12, 1947, both of whom were dependent upon decedent and both of whom have suffered damages."

The statement has been formally alleged and proof has been submitted as to that relationship and the law provides that a widow and a surviving child can claim pecuniary damages for pecuniary loss. I will tell you about that at the conclusion of my charge.

But certain other essential findings have to be made by you before you can reach the question of damages, and I repeat, you have got to find that very crucial matter of negligence. That element of negligence has to be found, and the way you find it is extremely important and I will tell you more about that.

As you have heard on a number of occasions throughout this trial, James W. Miller was a member of the crew of the S.S. African Glade, a freight ship, which carried a limited number of passengers. They had eleven passengers on this particular trip, as I recall. It is owned, operated and controlled by Farrell Lines, Inc., the defendant in this case. [850] It was a vessel of about 6,000 tons displacement, known in shipping circles as a C-2 type. You have seen a lot of photographs of the type. Then there has been this illustration of it here which has been before you throughout most of the trial, which is Court's Exhibit 2, and I will have more to say about that in a moment.

It was agreed by stipulation of counsel that this vessel was 439 feet long and that it had a beam of 63 feet; that is, it was 63 feet wide at its widest part or amidship. That is a pretty large vessel.

You have also heard testimony to the effect that the distance from the top of the rail or bulwark of the main deck to the surface of the ocean on a loaded C-2 type ship—and the main deck was the lowest open deck on the ship—is about 20 to 25 feet.

You have also heard testimony to the effect—which I believe was uncontradicted—that this ship was traveling at the rate of 14½ knots an hour during the night of the

disappearance, or during the time of the disappearance of James W. Miller, and that is between 11.30 p. m. on November 14, 1950, and some time the next morning up to about 10.20 a. m., November 15, 1950.

He was an assistant electrician and his [851] immediate superior was the witness Levy.

On November 15, 1950, while the ship was at sea in the middle of the South Atlantic, on a voyage from New York City to Dakar in French West Africa, James W. Miller was found to be missing. It is this crucial fact which has given rise to this litigation.

Let me tell you right away that the mere fact that James W. Miller disappeared from the S.S. African Glade does not in and of itself provide the plaintiff here with the right to collect money from the defendant. Before the defendant can be called upon to answer for and pay damages on account of the disappearance of James W. Miller, you have to make decisions with respect to certain threshold matters. They are very grave matters because this case presents some extremely delicate questions of fact, and I think that a good way to begin to examine the crucial facts of the case is to look at the complaint, which is the formal writing by which the plaintiff initiates a lawsuit, and in which she makes her claim for damages against the defendant Farrell Lines, Inc.

I won't read all of it because a lot of it [852] has got technical language which I am sure would be tiresome, and I don't think that much of it is important at this point. However, Paragraph 7 of this complaint is of crucial importance, and I think of considerable significance, and it states:

> "That on or about the 14th of November, 1950, while plaintiff's decedent (that means Miller) was lawfully on board said vessel he was caused to be washed overboard solely by reason of defendant's

negligence. The defendant, its agents, servants and employees, officers and crew members were reckless, careless and negligent in failing to maintain a proper and adequate guard and watch over plaintiff's decedent when they knew or should have known of his disturbed condition, in failing to take adequate and necessary steps to have him relieved from his duties, in failing to render adequate, prompt and proper medical aid and attention, and in failing to take all adequate, proper and necessary steps to conduct a search for him after he went overboard, as a result of all of which he was lost at sea and died on the 14th day of November, 1950."

[853] Let us look at the proof in the case. There is no proof that he was washed overboard, so you can forget that. There was no claim that he was not given adequate, prompt and proper medical aid and attention. But there is a claim—and the charge made by the plaintiff in this case is a charge directed very largely against Levy, the chief electrician, because the plaintiff says, in effect, "You, *Farrell Lines*, through the captain, through the officers, but through Levy (and Levy is the responsible pivot upon which they base their claim), you failed to maintain a proper and adequate watch over James W. Miller when you knew or should have known of his disturbed condition."

That is the first charge that the plaintiff has sought to prove in this case.

What does disturbed condition mean? It means that Miller was either insane or on the periphery of being insane; that he was mentally sick. That is what they mean.

They might have said so, but that is another way of saying so. And when they say "You didn't maintain a proper watch over Miller because he was disturbed, and you should have known that he was [854] disturbed," what would be a little more concise and practical way of express-

ing that in this case? Well, it is tantamount to their saying—and that is what the plaintiff in this case is urging you to find—that Miller was so disturbed that he took his own life and that the captain or responsible members of this crew knew or should have known that he was going to commit suicide.

There is no proof of any accident. If there were proof of an accident, it would be the burden of the plaintiff to prove it and there hasn't been one word said about any accident.

If there were an accident, the plaintiff would have to go further and show that the defendant was responsible for the accident, and there hasn't been one word of proof with respect to that.

The whole theory of this case in behalf of the plaintiff is, "Miller was mentally disturbed. Miller took his life because he was mentally disturbed. You should have known of it before he took his life, and because you should have known of it and didn't take adequate and proper steps, you are responsible to us in law and must pay us damages."

You should reflect very, very seriously [855] upon that proposition. Nobody knows how Miller left the ship. Nobody knows when he left the ship. Nobody knows where he left the ship. But the plaintiff's theory of the case is that he left the ship because of a disturbed mental condition which Levy, and through Levy the Farrell Lines, should have known about, and they should have taken adequate steps to prevent it.

If you find that he was mentally disturbed and if you find that he left the ship because of that mental disturbance, it necessarily follows that at the point of leaving the ship Miller probably had no desire or intention to save his own life and didn't jump off with a life preserver or any means with which to preserve his own life. You would be entitled to come to that conclusion.

You would be entitled also to come to the conclusion, on the basis of the evidence which has been argued before you very forcibly by plaintiff's counsel, that there were certain elements indicating or that should have indicated to Levy that this man was disturbed mentally, that Levy should have reported it to the captain, and that the captain should have taken steps to prevent him from doing harm to himself.

[856] Ladies and gentlemen, this is a very grave and a very serious question in this case, and the burden rests squarely upon your shoulders to decide that serious question. We know that at 10.20 the next morning an organized search of the ship failed to reveal the presence of Miller and that the ship was turned around to undertake a search, and it steamed all day until darkness, which I believe was fixed at 5.16 p. m. on the afternoon of the 15th of November, when the unsuccessful search was discontinued.

So that the case can be boiled down to two propositions: That the deceased, James W. Miller, was not properly watched or guarded by the defendant's agents or employees. That means the captain, officers, but particularly Levy, because that is the person upon whom the responsibility is charged in this case, should have known that Miller was in a disturbed condition, that is, mentally sick. And then the other proposition has to do with the fact that after learning of his disappearance the captain, officers and crew failed to take the adequate and necessary steps in the conduct of the search after his disappearance.

Let us deal a little further with that first proposition. It is clear that if Miller had showed any [857] signs of mental instability, then the master, his associate officers including Levy, the chief electrician, were obligated to take proper measures to prevent Miller from doing any harm to himself.

To put it in another way: Ask yourselves whether there was anything relating to the conduct of James W. Miller

prior to his disappearance, and known to Levy, which could have led Levy, and through him the master or the associate officers of the ship, reasonably to believe that Miller might have jumped overboard, because unless there was, you cannot charge the Farrell Lines with the responsibility for Miller's disappearance from that ship.

What does the plaintiff rely on? The unmade bed on the morning of the second day, the smoking when he previously said he had not smoked, the pacing up and down in deep thought, and then the use of that word "moody" by Captain Wilder.

Let me warn you a little bit about the use of the word "moody," because I know that the word "moody" has some connotations when you are talking about people who take their lives.

This page was read to you by Mr. Kaplow, I believe—at least, the pertinent part of it.

[858] Captain Wilder was asked this—I am reading from the bottom of page 30—

> "In your conversations with the chief electrician what did he tell you in the course of his investigation? A. As near as I can remember now, he told me (that is, Levy told me, the captain) that Miller was very quiet and sort of moody but nothing out of the ordinary."

Here is the captain paraphrasing a statement of Levy at the time of his deposition which was taken July, 1955.

Obviously the better evidence is what Levy testified to, because that is the source of Wilder's testimony. Do you believe that Levy told the truth, the whole truth and nothing but the truth?

The plaintiff's entire case rests largely, so far as the first charge of negligence is concerned, the failure to take proper and adequate steps to prevent Miller from doing harm to himself, almost entirely on the testimony of Levy,

and, of course, for that reason he becomes a very important witness.

We do know a little bit about how Miller must have disappeared from the ship because the lowest [859] open deck was the main deck, which I have told you measured from the top of the solid bulwark or fence about 20 to 25 feet from the surface of the sea, and that bulwark or railing was three or four feet high.

If he left the ship from any other point it was probably from a point higher than that, and with the ship going at that speed of 14½ knots an hour you have to decide whether or not Miller was injured when he hit the surface of the water and what his chance of survival was.

You have the testimony of the experts, one of whom, Captain Sheridan, told you that in his experience a man who falls into the sea and is not rescued within a half to a full hour has very small chance of being rescued. The other one, Captain Feinne, said that the man could have been alive at the end of twenty hours.

It is up to you to decide which one told the truth, or apart from which one told you the truth, which one you prefer to accept. You have that stupendous right to choose between the testimony of experts.

We know that Levy went looking for Miller on the morning of the 15th. He went looking for him [860] at 9 o'clock because he wanted his help to do a job, and he made a brief search but, not having found him, he went back to his work and then when Miller didn't appear at the coffee break at 10 o'clock he made a more thorough search and then not having found Miller and having missed him at the mess where the other crewmen gathered, he related the facts to the first assistant engineer and to the master.

Then at that point we have a complete search of the ship by three searching parties. The captain turned the ship around and they steamed all day until darkness fell.

Charge of the Court

I will tell you a little bit more about the adequacy of the search later in the charge, but I think I should dispose of one or two matters dealing with the burden of the plaintiff in this case. The plaintiff has the burden of proving by a fair preponderance of the evidence that James W. Miller disappeared from the S. S. African Glade because of the negligence of the defendant Farrell Lines, Inc., and further that that negligence was the proximate cause of his disappearance.

It is not up to the defendant to explain how and why Miller disappeared. It is up to the plaintiff to [861] prove that his disappearance was chargeable to the defendant, chargeable under these rules of law, and it is only after the plaintiff has sustained that burden that you can approach the question of damages.

You have got to believe that the evidence of the alleged negligence of the defendant outweighs the evidence contrary to that proposition. You have got to believe that the alleged negligence of the defendant is more convincing than the evidence to the effect that there was no negligence, and unless it is more convincing you must find for the defendant.

What do we mean by the preponderance of evidence? In a controverted case you have elements of proof which point one way, elements of proof which point another way. You have bits of evidence, inferences that you can reasonably draw from the evidence, which point to one conclusion or the other and as you build up your case you place the evidence for the plaintiff on one side, for the defendant on the other.

It is like weighing on the two old-fashioned circular plates that were parts of an old-fashioned apothecary scale.

Let us visualize a scale used by the old [862] apothecary or the scales you see in the arm of the symbolic figure of justice with the two chains supporting these two circular

metal plates, and it is just like placing the evidence on each of these two plates, one plate for the plaintiff and the other for the defendant, and then determining whether and how these plates or scales come into some relationship with each other.

If you find that the evidence of the alleged negligence outweighs the evidence contrary to that proposition, then you must find a verdict for the plaintiff.

If on the other hand you find that the evidence to the contrary, that is, that there was no negligence, outweighs the contrary proposition, then you find a verdict for the defendant.

Then there is the third possible alternative. Suppose you find that the evidence brings these two metal plates in perfect alignment and that neither outweighs the other. Suppose your convictions are such that neither plate is tipped, however slightly, more than the other. Then if this is so, the plaintiff has failed to sustain the burden and you must find a verdict for the defendant.

[863] In other words, in order for the plaintiff to succeed, the circular plate on which you have built up the credible evidence in her favor must tip, however slightly, in her favor.

Now, what do we mean by an inference, because in this case particularly, with such a delicate question of fact as that, you have to bring to bear your full powers of judgment, as I know you will.

An inference is defined as a deduction or a conclusion drawn by reason from the premises established by proof, from facts or propositions known to be true.

Let me give you an example: Suppose you are seated at home reading a book and it is nighttime and you have the blinds drawn and some member of the family comes in with a wet umbrella, wearing galoshes and a raincoat, and removes those articles. It would be a reasonable inference that it has been raining.

Suppose, to give you an example a little bit closer to the sea, the captain of a freight vessel asks a sailor to go to the bow because there is something at the bow that needs to be fastened or chained properly, and let us suppose there is a very, very rough sea running, with waves crashing [864] over the bow, and he says to him, "Now, I want you to be careful. I am going to rig up a line and I want you to wear a harness so that when you go out there you will have the freedom of your both arms, and you will be kept on the ship without fear of being washed overboard."

And then let us assume they put the harness on this man, and let us assume that they have often used this type of harness before and they have often used this type of line before in a similar type of storm in comparable weather.

Then let us assume that the sailor goes out to the bow and that while he is doing the task assigned to him a large wave crashes over the bow, and after the water has subsided and the bow comes up again within full visibility the sailor is not there and the line is broken.

What is the reasonable inference? The reasonable inference is that he was washed overboard. That is the only reasonable inference you could draw from those circumstances.

There are thousands and thousands of others which I could cite as examples, but I am sure that in your daily lives you are constantly resorting to [865] the same type of judgment and appraisal in making important decisions, and it is your judgment which you must bring to bear.

Now, proximate cause. I have told you that not only does the plaintiff have the burden of proving by a fair preponderance of the evidence the negligence of the defendant, but she must go further and show that that negligence was the proximate cause of, in this case, the disappearance of James W. Miller.

Charge of the Court

Proximate cause means a cause, or element of causation, the reasonable and natural consequence of which would lead to the disappearance, and defendant's negligence must be a link in an unbroken chain of reasonably foreseeable events.

You must determine whether there was a direct causal relationship between the act of the defendant—in this case the charge that the defendant failed to conduct an adequate and proper search, and the other charge, that the defendant failed to guard and protect Miller when there were reasonable signs of his mental disturbance—you have got to find that between either one or both of those acts of negligence there was a causal relationship between that and the disappearance, and that except for that [866] causal connection the disappearance would not have occurred.

The question of proximate cause is extremely important in this case. If you believe that Miller committed suicide, that he jumped off this ship of his own volition because he was mentally disturbed and that there was no reason for anyone to suspect that he was going to commit suicide, then clearly the defendant cannot be held liable. The Farrell Lines cannot be held liable unless you find that there was reasonable cause to believe that he was mentally disturbed, and unless, further, they took such steps as you believe were reasonable under the circumstances to protect him from any harm.

It is up to you to determine whether the plaintiff has sustained her burden of showing that Miller manifested signs of mental instability which could reasonably have led the defendant, through Levy, the electrician—because that is the pivot upon which they relied—to believe that there was danger that Miller would do harm to himself or take his life.

I have already told you what we mean by negligence and I believe you understand that sufficiently.

Charge of the Court

What do we do with witnesses, because in the [867] case much of what Levy says is not contradicted, but the plaintiff takes the position that he has not been frank with you, that he has not told you all the truth, that you should draw certain inferences from things that he said.

Well, now, be very careful, be very careful. You cannot make proof in a case that does not exist. You can destroy a witness' credibility. You have a perfect right, if you want, to come to the conclusion either that Levy told the truth, the whole truth and nothing but the truth; that he told part truth and part falsehood; that he may have been accurate in some respects or inaccurate in other respects; or perhaps that he wilfully perjured himself.

If you believe that he told a wilful misstatement at any point then the law gives you the right to reject that part of his testimony which you believe to be tainted by the wilful falsehood and accept only that which you believe to be true, or you can reject all of it, pretty much like a man eating an apple finds that it has an imperfection; some men will eat the good part around it and throw away the bad; others will throw away the whole fruit. That is what you do with testimony which you believe [868] may be affected by a wilful falsehood, and that applies not only to Levy but to every witness in the case if you think any witness was guilty of a wilful falsehood.

Remember, however, that Levy as well as Aiken, the chief steward, as well as Captain Wilder, as well as Crowell, the first assistant engineer, all gave these statements under oath on November 21, 1950, long before there was a lawsuit, long before there were lawyers in the case, to the American Consul at Dakar, West Africa.

You would do well to consider these statements very carefully.

One of the tests which you apply in determining the weight and credibility you want to give to any particular witness is the inherent probability of the witness' story.

Did it have the ring of truth? Did it appeal to you as being reasonable, credible, believable? Or did it have an element of disharmony or falsehood? Did it lack the reasonableness which you feel should be attributed to a true story?

Mrs. Miller was a witness. She appeared before you. She has been under attack here on the basis that her relationship to her husband may not [869] have been a relationship normally existing between husband and wife.

It is an admitted fact that between Christmas Eve 1947 and April 1950 she saw her husband only once, despite the fact that she had a small child and despite the fact that it is uncontroverted that he had leaves sufficient to have permitted him to make the trip to the place where she lived.

She explains that by saying that he was anxious to accumulate service on ships so that he could obtain his citizenship as quickly as possible. But that does not explain why he chose not to go home during his leave periods. He was free during those leave periods. He was just as free to go home as he was to stay away from home, and there is a very compelling inference in this case that he chose not to go home.

You have to decide as to why he did not go home between April 1950 and the date of his disappearance. Between December 1947 and November 1950, although he had a number of leaves, according to Mrs. Miller's testimony he went home once. That was in April 1950. Ask yourselves why. Ask yourselves whether Mrs. Miller gave you the whole explanation. Did she tell you the truth, the whole [870] truth and nothing but the truth?

She is an interested witness. That does not mean that her interest in this case, her obvious financial interest in this case, disqualifies her as a witness. It just means that it is one of the elements that you can consider.

Every witness, either by virtue of relationship to a litigant in the case, through employment, financial interest, relationship to another witness, all of those elements can be considered by you as bearing upon his credibility.

Suppose a witness makes a contradictory statement. You can consider that, too. The appearance of a witness on the stand—that is why this chair is where it is, so that you can see the witness. You can consider that.

And then remember that it is the quality of the evidence, not the quantity, that counts.

And in weighing the evidence, in giving it that weight, putting it on that plate and attributing to it the weight that you believe it should have, you should emphasize its quality rather than its quantity.

What do we mean by the weight of evidence? [871] I want to give you a very homely example. I was once in a dining car on a train and I was eating at the same table with two ladies and a little boy and one of the ladies was the mother of the boy, and she had decided that he should eat spinach and a lamb chop.

The little boy was very displeased about that and he ate his lamb chop and when he got to his spinach he pushed his plate away, and the mother said to the other lady, who apparently was related to her, "You know, Johnny just loves spinach," and the lady smiled.

Well, now, I couldn't help smiling, but what did I do and what did that lady do when she was smiling? She was weighing the evidence. Obviously Johnny didn't love spinach. She said he loved spinach, but he didn't. His gesture contradicted the words of the mother, but the words of the mother, the smile of the lady and the gesture of the boy taken together added up to what? Added up to little Johnny not liking spinach.

That is what you do when you weigh evidence. You have to project yourselves against all of the background, all of the circumstances surrounding a particular incident,

and ask yourselves what would a reasonable man have concluded? Put yourself in [872] the position of Levy and try to follow the contacts that Levy testified to with Miller during the four days he was his immediate superior on this boat, and ask yourselves what would a reasonable person have done under these circumstances?

Was there any reasonable basis to believe that he was mentally disturbed and that something should have been done about it?

As to the expert witnesses, I have already told you. We heard Captain Feinne, Captain Sheridan and Mr. Umstead, all men of very vast experience in handling vessels and going to sea. They have testified at great length. They have been examined with great thoroughness and great skill. And then to some extent Captain Wilder and Captain Ware, as well, although they were witnesses to the events, much of what they testified to was in the expert field.

You have to decide for yourselves whether the search was adequate and proper once the alarm was given.

Let us get to the adequacy of the search, because that is the second basis upon which the plaintiff claims that she is entitled to collect from the Farrell Lines in damages, and here again I don't [873] want to repeat it, but it is so important: She has the burden of proving by a fair preponderance of the evidence that the defendant failed to take all of the adequate, proper and necessary steps to search for Miller after his disappearance. She also has the burden of proving by a fair preponderance of the evidence that because of the inadequacy or impropriety of that search Miller died.

The normal rule is that proper and efficient means should be taken to effect a rescue of a seaman who has fallen overboard. It is pretty clear from this case that no one on the vessel knew that Miller had left the ship until the morning of November 10th, and only after the

vessel had been carefully searched—I believe that was at 10.20—when the ship was turned around, put on a reverse course, was a sea search undertaken.

A great deal of time has been spent in this case on the question of whether or not the ship was properly handled from this time forward. Here again there is a very serious question of causal relationship between the alleged failure on the part of the master and crew to conduct a proper and adequate search and the disappearance or death of Miller.

[874] You have to decide which of the expert testimony you wish to believe as to whether or not a proper and adequate search was conducted. But you also have to be satisfied that the plaintiff has sustained the burden of proving by a fair preponderance of the evidence that this search, even assuming that it was inadequate, was the proximate cause in whole or in part of the death at sea of James W. Miller.

In other words, ladies and gentlemen, if you believe—and you are entitled to believe it from the evidence in this case—that Miller committed suicide by jumping from the railing of the main deck during the night of November 14th to 15th, and that he was already dead at the time the ship was turned around, then the plaintiff cannot prove that part of the case, because if he was already dead at the time the defendant undertook its sea search, it didn't make any difference what kind of a search they conducted. Since he was already dead, their search could not have saved him. The search would have been subsequent to the death and could not have been the cause of the death.

So that if you believe that Miller was dead [875] at that time, when they turned the ship around and started the search, it makes no difference how they conducted the search, because they couldn't have saved Miller in any event. It has to be the proximate cause of the disappearance or death. It is not the proximate cause of the disap-

pearance or death if Miller was already dead because the search was subsequent to it.

I hope I have made that clear because it is an extremely important consideration in this case. In other words, to put it differently, you have got to be satisfied that Miller was alive at the time the defendant's responsibile employees knew of the disappearance and undertook the search; that the search was inadequate and improper and that there was a direct causal relationship between the inadequate search and the disappearance or death of Miller.

Let me come to the question of damages, and here again I want to emphasize the fact that the law gives you no right to award damages unless you are satisfied of all of the other elements in the case about which I have charged you.

You have to pass the question of the burden of proof, the weight and credibility of the evidence, [876] the preponderance of the evidence, the existence of the negligence, the causal, direct causal relationship between negligence and the disappearance or death of Miller, and until you have passed all of that in favor of the plaintiff you cannot come to the question of damages.

If you have not satisfied yourselves with respect to all of the matters about which I have charged you up to this point in favor of the plaintiff, then your verdict must be for the defendant. But assuming that you have passed those and have made all of your findings in favor of the plaintiff, and you feel that the plaintiff has sustained her burden by proving by a fair preponderance of the evidence that the defendant's negligence, either the search or the failure to take care of Miller, was the proximate cause in whole or in part for his disappearance or death, then and only then you consider the question of damages.

They are broken down into two principal elements. One is the personal suffering of the deceased between the

time his body struck the water and the time he died, and I realize you have to do the best you can on the basis of an almost complete [877] lack of evidence. The theory of the case has been tried, as I say, on the basis of mental instability and the inferences are very strong that Miller jumped off this ship of his own volition because he wanted to do away with himself. But we don't know where, how or when this disappearance occurred. We don't know how he died or when he died.

You will have to do the best you can under all of the evidence in the case. And may I stress this, that it is the suffering of Miller. The law does not provide the beneficiaries for any compensation for pain and suffering to them because of their bereavement, because of their grief, because of their loss of companionship or society or their mental anguish, however much these matters may appeal to our sensibilities.

You cannot give any award on that basis. It is only the personal suffering, the pain and suffering of the decedent between the time he struck the water and the time he died for which you can award a verdict and express it in dollars and cents.

And then the other element of the damages consists of the pecuniary loss to his beneficiaries, the pecuniary loss to his widow, the pecuniary loss [878] to his child, as a result of his death.

You take into account Miller's age. As I recall, he was 36 years of age. You take into account his condition, his probable span of employment in the light of his age and physical condition had the disappearance not occurred; the probabilities of his being able to continue his work beyond the date of the accident; the probable continuance of his contributions to his wife or his child, or both of them.

You can consider whether he would have lived the span given by the statistical tables of 31 years. You can consider that he would have lived 31, 21, 11 or even 41

years It is entirely up to you. You are not bound by those tables; they are merely a guide.

And you can consider whether he would have improved his earning capacity, whether it might have been cut short or impaired. And then you must decide on the basis of his past conduct towards his family, in the light of his propensity to be generous to his wife and child, or his failure to be generous about what do you think he would have continued to give them and what do you think was the pecuniary loss that they sustained.

His salary for about two years prior to the [879] disappearance, as I recall the testimony, was just below and above $300. Let us say approximately $300. He gave regular allotments, according to the slips that Mrs. Miller had, of $120 a month, plus $100 a year for extras, which meant that he gave her on the basis of that salary of about $300 a month $120 a month, or roughly something just short of $1500 a year. This was a little more than a third of his total salary.

It has been argued to you that he was not on good terms with his wife, that she worked, and that this amount was not really a contribution for her but for the child.

It is up to you to decide what you think it was under all the circumstances of the case, and then it is up to you to decide what you think the pecuniary loss was, first to the widow and secondly to the child, if and when you get to the question of damages.

An amount of money given now representing an amount of money which normally would be paid in the future is entitled to be deducted by what we call a commuted amount, and those of you who are accountants and have facility with figures will understand what I mean.

[880] A rough rule of thumb for obtaining present cash value is to discount the estimated financial loss by a percentage equal to the number of years it is assumed that the pecuniary benefits will continue to be received. For instance, suppose somebody owes you $1,000 a year for

the next ten years. That means you are going to get $10,000 over a period of ten years. But suppose he comes to you and says, "I want to pay you now, but in order to pay you now I think you should give me a discount."

Well, now, it is a normal transaction in business to give a discount where you anticipate a payment over a period of years, and the rough rule of thumb would be that you deduct 1 per cent for each one of those years. So that a prepayment of $9,000 would roughly be the fair liquidation for that $10,000 amount payable over a period of ten years, and you can, if you consider life expectancy, either improvement or impairment, come to some amount. If and when you come to the question of damages, it would be proper and reasonable for you to commute that value in the light of the prepayment.

Please deliberate with a disposition to listen to your fellow jurors and listen to their points [881] of view, and please be anxious and willing to express and to explain your own points of view.

In that way you are performing one of the highest and most important duties of citizenship.

Regard your foreman as you would a chairman of a committee, and when your foreman can report that you have agreed upon a verdict—your verdict must be unanimous—the marshal will report back to me and we will convoke the Court to hear your verdict.

If in the meantime you wish to refresh your recollection about any of the evidence, or you wish to receive any of the exhibits, if your foreman will send me a note I will see that you are accommodated.

If there is any part of the charge which you wish to have elaborated or explained, I will be glad to do anything you wish in that respect.

Because of the extreme importance of the questions of fact in this case, I have prepared two questions which I

want you to answer, and I am going to hand this paper to the foreman.

Mark this Court's Exhibit 3, please.

(Marked Court's Exhibit 3.)

The Court: Now, Court's Exhibit 3 consists of two questions and a form of verdict.

[882] The first question is this:

> "Did Miller's conduct aboard the S. S. African Glade between November 10, 1950, and November 14, 1950, manifest signs of instability which could reasonably have led the Master or his associate officers or Chief Electrician Levy to believe that there was danger that he might do harm to himself?"

You will please answer that question yes or no.

The second question, which is in two parts, and which you should also answer yes or no, is as follows:

> "Upon being notified that Miller had disappeared from the S. S. African Glade at 10.20 A. M. on November 15, 1950:
>
> "(a) Was James W. Miller alive at that time?
>
> "(b) Did Captain Wilder, the Master of the ship, take all proper and efficient means to effect a rescue?
>
> "Third: In addition to answering the above questions, please report your verdict as follows:
>
> "For defendant or For plaintiff,"

and then in the event the verdict is for the plaintiff there are three subdivisions and your verdict may be [883] divided into any one or all of those three subdivisions as you see fit:

Charge of the Court

"(a) Amount, if any, awarded for the pain and suffering of James W. Miller.

"(b) Amount, if any, awarded for the pecuniary loss to the widow.

"(c) Amount, if any, awarded for the pecuniary loss to the child."

I hand this to the foreman of the jury and the marshals may now be sworn and the jury retire.

I just would like a moment to confer with counsel. There may be suggestions or exceptions. I promise this won't take more than a few minutes, ladies and gentlemen.

* * *

[884] The Court: The jury may retire.

(Jury retired at 1.05 p. m.)

* * *